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MYEG SERVICES BHD & ANOR v. COMPETITION COMMISSION & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO: WA-25-81-03-2018]
B 19 APRIL 2019

ADMINISTRATIVE LAW: *Judicial review – Application for – Application to quash decision of Competition Appeal Tribunal – Whether there was infringement of s. 10(2)(d)(iii) of Competition Act 2010 – Whether company held dominant* C *position in upstream and downstream market – Whether company abused dominant position by not ensuring level playing field for other companies – Whether company applied different conditions to equivalent transactions with competitors – Whether acts of company harmed competition in market – Proportionality of penalties imposed on company – Whether in accordance with guidelines – Competition Act* D *2010, ss. 2, 35, 51*

COMPETITION LAW: *Anti-competition practices – Infringement – Allegation of – Whether there was infringement of s. 10(2)(d)(iii) of Competition Act 2010 – Whether company held dominant position in upstream and downstream market – Whether company abused dominant position by not ensuring level playing field for* E *other companies – Whether company applied different conditions to equivalent transactions with competitors – Whether acts of company harmed competition in market – Proportionality of penalties imposed on company – Whether in accordance with guidelines – Competition Act 2010, ss. 2, 35, 51*

F MyEG Services Berhad ('the first applicant') was involved in the business of development and implementation of the electronic government services project and the provision of other related services for the Government of Malaysia ('GOM'). MyEG Commerce Sdn Bhd ('the second applicant') was a wholly-owned subsidiary of the first applicant. The first respondent ('MyCC') is empowered by the Competition Act 2010 ('Competition Act') G to ensure compliance, investigate complaints on anti-competitive behaviours, carry out market reviews and impose penalties on companies found to have infringed the Competition Act. The second respondent, Competition Appeal Tribunal ('CAT'), has exclusive jurisdiction to review any decision made by MyCC under s. 35 of the Competition Act. All H temporary foreign workers who are under the Pas Lawatan Kerja Sementara ('PLKS') are required to have their PLKS renewed annually in order for them to have employment in Malaysia. A press statement was issued by Jabatan Imigresen Malaysia ('JIM') confirming that all PLKS renewals would be processed online through the first applicant only. To fulfil the I requirement for a PLKS renewal, several conditions such as the purchase of three mandatory insurance policies for foreign workers must be satisfied ('mandatory insurances'). Subsequently, the second applicant entered into an agency agreement with RHB Insurance Berhad ('RHB Insurance') to act as its

agent to transact in, *inter alia*, the mandatory insurances. Pursuant to the agreement, a commission was paid by RHB Insurance for every transaction. However, MyCC received complaints that the first applicant had abused its dominant position in the provision and management of the online PLKS renewals. It was alleged that the first applicant, as the sole provider for the renewal of PLKS, had abused its position to 'force' employers to purchase the mandatory insurances through the second applicant. MyCC conducted its investigations pursuant to the Competition Act, by issuing notices for the provision of documents and information. MyCC made a finding of an infringement in its final decision by determining that there was an infringement against s. 10(2)(d)(iii) of the Competition Act and made the following findings, *inter alia*, (i) that MyEG had abused its dominant position by not ensuring a level playing field or applying different conditions to equivalent transactions with its competitors to an extent that it had harmed competition in the market for the sale of the mandatory insurances for online PLKS renewal applications in which MyEG, through its subsidiary MyEG Commerce, was a participant; (ii) a fine of RM2,272,2000 was imposed on MyEG; and (iii) MyEG was to cease immediately from imposing different conditions to equivalent transactions in the processing of mandatory insurances for online PLKS renewal applications. Pursuant to s. 51 of the Competition Act, MyEG filed a notice of appeal. The CAT delivered its decision and affirmed MyCC's final decision, and imposed a daily penalty of RM7,500 from 25 June 2016 (MyCC's final decision) to the date of the CAT's decision ('decision of CAT'). Aggrieved by the decision of the CAT, MyEG filed this judicial review application to quash the said decision and to declare the said decision to be null and void. The issues that arose were (i) whether MyEG constitute an 'enterprise' within the definition of s. 2 of the Competition Act; (ii) whether MyEG was in a dominant position within the definition of s. 2 of the Competition Act; (iii) whether MyEG was applying different conditions to equivalent transactions to other trading parties within para.(d) of s. 10(2); and (iv) whether the acts of MyEG had 'harmed competition' in the market which they were participating in, whether upstream or downstream.

Held (dismissing application):

(1) MyEG conceded that they fell within the definition of 'enterprise' in s. 2 of the Competition Act, and the CAT had made a finding that MyEG was in a dominant position within the ambit of s. 2. Thus, this court agreed with the decision of the CAT that MyEG held the dominant positions in both the upstream and downstream market. There was nothing illegal or irrational about this finding. (paras 49, 51 & 52)

(2) In construing the phrase 'equivalent transaction' within s. 10(2)(d) of the Competition Act, the duty was on the court to interpret the statute in order to ascertain legislative intent by reference to the words appearing in the provision itself. The phrase 'equivalent transaction' is not defined

A in s. 2 of the Competition Act. Where the words/phrase of an Act of Parliament is not defined in the Act itself, it is permissible for the courts to ascertain the ordinary meaning of the words/phrase by reference to the dictionary. The word 'equivalent' comes from the word 'equal', and the word 'equal' means 'the same', whether in size, amount, number *etc* B (Oxford Advanced Learner's Dictionary of Current English 3rd edn). Therefore, the CAT did not commit any error in coming to the conclusion that 'equivalent transaction' simply means 'same transaction'. The transactions of MyEG that formed the subject matter of this case was the purchase of the mandatory insurances. The purchase of the mandatory insurances by the employers whether directly with C MyEG such as RHB Insurance or with other insurance companies or agents would amount to the same or equivalent transactions. (paras 60 - 64)

(3) If the purchase of mandatory insurances was directly from MyEG, there D was automatic verification. But if the purchase of the mandatory insurances was from other parties, there was a requirement of a verification process, and this amounted to 'applying different conditions' to equivalent transactions. It was the position of the CAT that as a dominant concession holder in the upstream market, MyEG had a special responsibility to ensure that competition was not impaired E in the downstream market. MyEG had admitted that there was a difference in terms of delivery of the PLKS to the end users. On the factual matrix of the case, the MyCC came to a finding (which was affirmed by the CAT) that MyEG had infringed s. 10(2)(d)(iii) of the Competition Act. (paras 65-71)

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(4) MyEG had made it mandatory for the end users to purchase Foreign Workers Insurance Guarantee ('FWIG') through MyEG only. Bearing in mind that since MyEG was the sole and dominant concession holder for the PLKS renewal, there was an obligation on MyEG to grant equal G access of its facilities and prompt competition in the downstream market. This was clearly an abuse of the dominant position of MyEG, by eliminating competition altogether. In respect of the period of 2 May 2015 to 6 October 2015, the CAT found that the MyEG website had clearly stated that if the mandatory insurances were purchased from MyEG, there would be 'faster and easier renewal'. The CAT found that H the requirement of scanning and uploading of documents for verification for non-MyEG insurers 'clearly involved two different time sensitive processing methods, meaning different conditions were applied to equivalent transaction'. The requirement of scanning and unloading for the purposes of verification would consequently cause a delay in the I applications involving non-MyEG insurers, compared to the automatic verification in respect to MyEG insurers, leading to faster approval for the PLKS renewal. (paras 73-77)

(5) Where Parliament had used the phrase 'harm competition in any market', the courts must give effect to the words used by Parliament. It was not for the court to change the statutory words to 'harm to the consumers.' The automatic verification for MyEG related insurance companies and the requirement of additional steps for verification for non-MyEG insurance companies, was the fact that harmed the competition, which according to the Cat 'amounted to MyEG putting pressure on end users to purchase the mandatory insurances from MyEG by virtue of its dominant position in the downstream market'. The conduct of MyEG of using its dominance in the upstream market to induce the end users to use its services in the downstream market had put all the other agents and insurance companies at a competitive disadvantage. This was supported by the fact that the commission earned by MyEG for the sale of the mandatory insurances had increased tremendously during the relevant period. (paras 81 & 86)

(6) MyCC's guidelines states that exclusionary conduct is a form of conduct that prevents equally efficient competitors from competing. In the present case, the conduct of MyEG of using its dominance in the upstream market had put other agents and insurance companies at a competitive disadvantage. MyEG, in its position as the dominant concession holder in the upstream market, had failed to ensure that there was a platform equally available to all, so that there was no abuse in the downstream market. (paras 94 & 95)

(7) MyEG submitted that the CAT had acted unreasonably when affirming the imposition of penalty during the proof of concept ('POC') stage, from 5 January 2015 to 22 January 2015, which was essentially the 'test run' period. However, there was nothing in law to state that the POC stage was a defense to abusive conduct. On the issue of proportionality of the penalties imposed, both MyCC and the CAT were empowered by the Competition Act to impose the penalties and these penalties were imposed in accordance with MyCC's guidelines on financial penalties. (paras 87, 88 & 93)

Case(s) referred to:

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Karunairajah Rasiah v. Punithambigai Poniah [2004] 2 CLJ 365 FC ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Labuan Ferry Corporation Sdn Bhd v. Chin Mui Kien (Trading Under The Name And Style Of Econ Focus Enterprise) & Ors And Other Appeals [2018] 2 CLJ 142 CA ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 2 CLJ 249 HC ***(refd)***

PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***

Ranjit Kaur Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Legislation referred to:
Competition Act 2010, ss. 2, 4, 10(1), (2)(a), (b), (c), (d)(iii), (e), (f), (g), 15(1), 35, 36(1), 37, 39, 40, 44, 51, 58(2)(d)
Competition Commission Act 2010, s. 3

Other source(s) referred to:
Bindra's Interpretation of Statutes, 9th edn, p 394

For the applicants - Jack Yow, Kwong Chiew Ee, Raymond Yong, Penny Wong & Derek Yap (PDK); M/s Rahmat Lim & Partners
For the 1st respondent - Sharon Chong & Manshan Singh; M/s Skrine

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi J:

Application

[1] On 24 April 2018, this court has granted leave to the applicants to commence judicial review proceedings against the respondents, seeking the following reliefs:

(i) an order of *certiorari* to quash the decision made by the second respondent dated 28 December 2017;

(ii) a declaration that the decision of the second respondent dated 28 December 2017 is irrational and unreasonable; and

(iii) damages of RM2,272,200 for wrongful calculations of the decisions of the first and the second respondents.

[2] The grounds of the application are as follows:

(i) that the second respondent has failed to take into consideration the proof of concept;

(ii) that the second respondent has failed to take into consideration the relevant factors and materials put forward by the applicants showing that they had not infringed s. 10(2)(d)(iii) of the Competition Act 2010;

(iii) that the second respondent has erred in taking into consideration the period from 2 May 2015 to 6 October 2015 in computing the financial penalty of RM307,200;

(iv) that the second respondent has erred in its finding that the applicants had abused their dominant position under s. 10(2)(d)(iii) of the Competition Act 2010 in relation to the provision of the online renewal system to the end users; and

(v) that the Tribunal has erred in computing the daily penalties of RM7,500.

[3] Having considered the application and the submission of the parties, this court had dismissed the application with costs.

The Salient Facts

[4] The first applicant is a public listed company incorporated in Malaysia. The first applicant is involved in the business of development and implementation of the electronic government services project and the provision of other related services for the Government of Malaysia ("GOM")

[5] The second applicant is a company incorporated in Malaysia and is a wholly-owned subsidiary of the first applicant. The second applicant is principally engaged in the business of providing auto insurance intermediary services and other related ancillary services. The first and second applicants ("MyEG") are considered as an 'enterprise' within the definition of s. 2 of Competition Act 2010 ("Act 712").

[6] The first respondent ("MyCC") was established on 1 April 2011 pursuant to s. 3 of the Competition Commission Act 2010 ("Act 713") for the purpose of enforcing Act 712.

[7] MyCC is empowered by Act 712 to ensure compliance of Act 712, investigate complaints on anti-competitive behaviours, carry out market reviews and impose penalties on companies found to have infringed Act 712.

[8] The second respondent, Competition Appeal Tribunal ("CAT") was established under s. 44 of Act 712. CAT has exclusive jurisdiction to review any decision made by MyCC under ss. 35, 39 or 40 of Act 712.

Online Renewal System For Foreign Workers' Permit

[9] All temporary foreign workers who are under the pas lawatan kerja sementara ("PLKS") are required to have their PLKS renewed annually in order for them to have employment in Malaysia. The renewal of such PLKS is through Jabatan lmigresen Malaysia ("JIM").

[10] The GOM launched the Electronic Government as one of the multimedia applications of the Multimedia Super Corridor to reinvent itself to lead Malaysia into the Information Age as well as to further the political, social, cultural and economic development goals of Vision 2020.

[11] In 2011, the first applicant made a proposal for the provision of an online system for the renewal of PLKS in two phases:

(i) Phase 1 - renewal of PLKS for domestic helpers only; and

(ii) Phase 2 - renewal of PLKS to be expanded to cover all foreign workers.

[12] Phase 1 was implemented on 11 June 2011, and at which stage all JIM counters were still in operation.

[13] On 24 February 2012, an agreement was signed between the GOM and the first applicant on the 'Online Foreign Permit Renewal (Domestic Helper)' for a period of four years from June 2011 ("first agreement"). The scope of this agreement was for the first applicant to provide the services defined under the agreement and to provide the renewal of Visa Pass (temporary employment) - domestic helper (maid) and renewal sticker. Although the agreement expired on 22 May 2015, the first applicant continues to provide the online renewal system.

[14] With regard to phase 2, on 27 July 2012, the Kementerian Dalam Negeri ("KDN") notified the first applicant that the second phase of the concept was approved and it would be implemented by way of proof of concept ("POC") period for three months.

[15] The first applicant notified KDN that the POC was successful by way of letter dated 13 December 2013. The first applicant indicated its willingness to sign an expanded contract with the GOM for the provision of an online system for the renewal of PLKS for foreign workers from all sectors and requested that the POC be extended before the new contract was executed.

[16] KDN agreed to expand the first applicant's scope of work to include the renewal of PLKS workers from all work sectors. However, the new agreement was in a draft format and was not signed by both the GOM and the first applicant.

[17] Notwithstanding this, on 17 November 2014, a letter was issued by KDN to the first applicant and JIM, stating that a decision was made by the Minister of Home Affairs for the first applicant to implement the POC for the renewal of PLKS for all foreign workers from all sectors through online services.

[18] On 27 November 2014, the Director General of Immigration had issued a letter to all State Immigration Directors (in Peninsular Malaysia) informing them that the implementation of the POC would be carried out effective 1 December 2014. Therefore, after that date, all renewals of PLKS can only be done online.

[19] Before 5 January 2015, employers who had wanted to renew their foreign workers' PLKS could either do so manually at the JIM counters or online through the first applicant.

[20] On 5 January 2015, JIM closed its manual counters to facilitate the GOM's decision to implement a new standardised PLKS renewal system in Peninsular Malaysia. The system made it mandatory for all PLKS renewal applications to be done online *via* the first applicant's system. Essentially, the first applicant was the sole service provider for the renewal of PLKS on behalf of JIM.

[21] However, on 23 January 2015, the GOM reopened the counters for manual processing of the applications in light of the complaints made by the public.

[22] On 29 April 2015, a press statement was issued by JIM confirming that effective 2 May 2015, all PLKS renewals would be processed online again through the first applicant only.

[23] To fulfil the requirement for a PLKS renewal, several conditions such as the purchase of three mandatory insurance policies for the foreign workers must be satisfied. The three GOM mandated insurances are:

(i) foreign workers insurance guarantee ("FWIG");

(ii) foreign workers hospitalization and surgical schemes ("FWHS"); and

(iii) foreign workers compensation scheme ("FWCS").

(collectively referred to as "mandatory insurances".)

[24] The premiums for FWIG, FWHS and FWCS are determined by the Central Bank of Malaysia ("BNM") at RM50, RM120 and RM72 respectively. The purchase of mandatory insurances is mainly done through agents save for employers with a large number of foreign workers who make direct purchases from insurance companies.

[25] The FWIG may be obtained from any insurance company whereas the FWHS and FWCS may only be obtained from a panel of insurers approved by the Ministry of Health and the Ministry of Human Resources respectively.

[26] On 5 November 2008, the second applicant entered into an agency agreement with RHB Insurance Berhad ("RHB Insurance") to act as its agent to transact in *inter alia* the mandatory insurances. Pursuant to the agreement, a commission was paid by RHB Insurance for every transaction. On 10 November 2015, the first applicant also became an agent for AmGeneral Insurance Berhad, Syarikat Takaful Malaysia Berhad, Berjaya Sompo Insurance Berhad and Pacific & Orient Insurance Co Berhad.

The Investigation By MYCC

[27] Act 712 empowered MyCC to investigate, either on MyCC's own volition or upon a complaint. In this case, the investigation was conducted upon complaints made by parties under s. 15(1) of Act 712, which allows MyCC to conduct an investigation on any enterprise, agreement or conduct that has infringed or is infringing any prohibition under the Act 712.

[28] The complaints received by MyCC are that the first applicant had abused its dominant position in the provision and management of the online PLKS renewals. It was alleged that the first applicant, as the sole provider for the renewal of PLKS, had abused its position to "force" employers to purchase the mandatory insurances through the second applicant.

[29] MyCC conducted its investigations pursuant to Act 712, by issuing notices for the provision of documents and information. MyCC had interviewed 42 witnesses in total; including nine witnesses from the applicants, four witnesses from PIAM, one witness from Immigration Department of Malaysia, one witness from the Ministry of Home Affairs, 12 witnesses from insurance companies and 15 insurance agents.

Proposed Decision

[30] After the completion of the investigation, pursuant to s. 36(1) of Act 712, MyCC served its proposed decision dated 6 October 2015 on MyEG ("proposed decision").

[31] Upon being served with the proposed decision, MyEG submitted its written representation to MyCC dated 18 October 2015, and pursuant to s. 37 of Act 712, an oral representation session was convened on 18 February 2016.

Finding Of MyCC

[32] MyCC made a finding of an infringement in its final decision dated 24 June 2016. In the final decision, MyCC had determined that there is an infringement against s. 10(2)(d)(iii) of Act 712 and made the following findings:

(i) that MyEG had abused its dominant position by not ensuring a level playing field or applying different conditions to equivalent transactions with its competitors to an extent that it has harmed competition in the market for the sale of the mandatory insurances for online PLKS renewal applications in which MyEG, through its subsidiary MyEG Commerce is a participant;

(ii) a fine of RM2,272,200,00 is imposed on MyEG;

(iii) MyEG is to cease immediately from imposing different conditions to equivalent transactions in the processing of mandatory insurances for online PLKS renewal applications;

(iv) MyEG is to provide an efficient gateway for ALL its competitors in the market for the sale of the mandatory insurances and allow the other competitors to compete at the same level within 60 days from 24 June 2016;

(v) MyEG is to provide an undertaking in the form and manner acceptable to the Commission, to be fully compliant with PIAM's rules and regulations within 60 days from 24 June 2016; and

(vi) in the event that MyEG does not comply with the above directions, the Commission is at liberty to impose higher daily penalty for the subsequent period of non-compliance.

Appeal To CAT

[33] Pursuant to s. 51 of Act 712, MyEG filed a notice of appeal dated 22 July 2016.

[34] The appeal was heard on 17 July 2017 and 18 July 2017.

[35] On 28 December 2017, the CAT delivered its decision and affirmed MyCC's final decision, except on the order with regards to compliance with PIAM's rules and regulations. Added to that, the CAT had imposed a daily penalty of RM7,500 from 25 June 2016 (MyCC's final decision) to the date of the CAT's decision, ie, 28 December 2017 ("decision of CAT").

[36] Aggrieved by the decision of the CAT, MyEG has filed this application to quash and to declare the said decision to be null and void.

The Findings Of The Court

Principles On Judicial Review

[37] In *Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of Council of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are:

(i) illegality;

(ii) irrationality; and

(iii) procedural impropriety.

[38] By illegality as a ground for judicial review, it means "that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it" and that "... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess."

[39] By irrationality, it means '*Wednesbury* unreasonableness' and "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it."

[40] By procedural impropriety, it includes "failure by an administrative tribunal to observe procedural rules that are expressly laid out ... " and "duty to act fairly".

[41] The law on this area has been restated in the Federal Court decision of *Ranjit Kaur Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 where it was held that the court can scrutinise not only the decision-making process of a public body, but also the substance and merits of the decision:

A [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality",* B *"irrationality" and possibly "proportionality" which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*

[16] The *Rama Chandran* decision has been regarded or interpreted as C giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Peransang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in D which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a E decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, *it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion*.

F [18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681, *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v. Yap Kok* G *Foong & Another* [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

H (See *Swedish Motor Assemblies Sdn Bhd v. Hj. Md Ison Baba* [1998] 3 CLJ 288].

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that *where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the* I *Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amenable to judicial review*. (emphasis added)

Act 712

[42] Act 712 came into effect on 1 January 2012 and was enacted to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of the consumers. Act 712 is to prohibit anti-competitive conduct and therefore makes it an offence, *inter alia*, for an enterprise to dominate any market for goods or services, whether directly or indirectly, limit or control productions, market outlet or market access to the prejudice of consumers, or applying different conditions to equivalent transactions that may harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.

[43] In *Labuan Ferry Corporation Sdn Bhd v. Chin Mui Kien (Trading Under The Name And Style Of Econ Focus Enterprise) & Ors And Other Appeals* [2018] 2 CLJ 142, the Court of Appeal held that:

> [59] It is plain and obvious that the object underlying the Competition Act is to protect the interests of the consumers by prohibiting anti-competitive conduct. It is meant to regulate conduct among competitors, as the title to the Act suggests. It is not meant to regulate monopolies of essential products or services. Most importantly, the Act does not prohibit monopolies, nor does it regulate them.

[44] Act 712 provides two types of prohibited conduct in commercial activities:

(i) engaging in anti-competitive agreements under s. 4; and

(ii) abuse of dominant position under s. 10.

[45] In the present case, we are only concerned with the application of s. 10, namely on the abuse of dominant position.

Abuse Of Dominant Position Is Prohibited

[46] The CAT has affirmed the findings of MyCC that the applicants had infringed s. 10 of Act 712, which reads:

> (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or service.
>
> (2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include:
>
> (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
>
> (b) limiting or controlling:
>
> (i) production;
>
> (ii) market outlets or market access;

A (iii) Technical or technological development; or

(iv) Investment,

To the prejudice of consumers;

(c) refusing to supply to a particular enterprise or group or category of
B enterprise;

(d) applying different conditions to equivalent transactions with other trading parties to an extent that may:

(i) discourage new market entry or expansion or investment by an existing competitor;

C

(ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or

(iii) harm competition m any market in which the dominant enterprise is participating or in any upstream or downstream
D market; ...

[47] Section 10(1) of Act 712 provides that an abuse of dominant position by an enterprise is prohibited. What amounts to abuse of dominant position includes those acts specified in paras. (a) to (g) of sub-s. 10(2). Therefore, an
E abuse of dominant position occurs when an enterprise which possesses such significant power in a market, conducts itself in any of the manners provided in paras. (a) to (g) of sub-s. 10(2). In the present case, MyCC made a finding that the MyEG had abused their dominant position by infringing s. 10(2)(d)(iii) of Act 712.

F **[48]** In order to ascertain whether there is infringement of s. 10(2)(d)(iii) of Act 712, the following elements must be established:

(i) Whether MyEG constitutes an 'enterprise' within the definition s. 2;

(ii) Whether MyEG is in a 'dominant position' within the definition s. 2;

G (iii) Whether MyEG is 'applying different condition to equivalent transactions to other trading parties' within para. (d) of sub-s. 10(2); and

(iv) Whether the acts of MyEG have 'harm competition' in the market which they are participating, whether upstream or downstream.

H *Whether The MyEG Constitute An 'Enterprise' Within s. 2*

[49] In the present case, MyEG had conceded that they fall within the definition of enterprise in s. 2 of Act 712, which reads:

> enterprise means any entity carrying on commercial activities relating to goods and services, and for the purposes of this Act, a parent and
I subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.

Whether MyEG Are In A 'Dominant Position' Within s. 2

[50] 'Dominant position' is defined to s. 2 as 'a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors'.

[51] The CAT has made a finding that MyEG is in a dominant position within the ambit of s. 2, as can be seen from para. [25] of the CAT's decision, which reads:

> [25] It is not disputed that **My EG as the sole enterprise given by KDN/ JIM for the renewal of PLKS is in a dominant position in the upstream market**. By virtue of My EG and My EG Commerce being a single entity, **My EG Commerce can be considered to be in a dominant position in the downstream market. The dominant position of the Appellants fits within the meaning of the dominant position in section 2 of the Act**. (emphasis added)

[52] Having considered the facts in this case, I agree with the decision of the CAT that MyEG holds the dominant positions in both the upstream and downstream market. As such, there is nothing illegal nor irrational about this finding.

Whether MyEG Are 'Applying Different Condition To Equivalent Transactions To Other Trading Parties' Within para. (d) Of sub-s. 10(2)

[53] The main issue in this case is whether MyEG has abused their dominant position in the downstream market, with regards to the purchase of the mandatory insurances in the PLKS renewal applications, arising from their dominant position in the renewal of PLKS in the upstream market.

[54] In respect of this issue, the CAT had affirmed the findings of MyCC that MyEG had infringed s. 10(2)(d)(iii) of the Act 712, in that MyEG have applied "different conditions to equivalent transactions with other trading parties to an extent that may ... harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market."

[55] It is the submission of MyEG that the decision of CAT to affirm the findings of MyCC is irrational, as MyCC has failed to consider whether there is 'equivalent transaction' within s. 10(2)(d) of Act 712, and this can be seen from para. [37] of the CAT's decision, which reads:

> [37] **We agree with the submission of counsel for the Appellants that the Commission did not adequately consider whether, on the facts of this case, there is 'equivalent transaction' within section 10(2)(d) of the Act**. We note that there is no local authority on this aspect. Be that as it may, it is important to consider the issue of the meaning of 'equivalent transaction'. If the evidence in this case failed to meet the meaning of

A 'equivalent transaction', hence 'applying different conditions' thereof does not arise and in the circumstances the appellant should succeed in this appeal. (emphasis added)

[56] However, I am of the considered opinion that in making its decision as to whether to affirm the findings of MyCC or to reverse the same, it is B the duty of the CAT to ascertain the meaning of 'equivalent transaction' within s. 10(2)(d) of Act 712 and to ascertain the factual aspects of equivalent transactions. The fact that MyCC did not adequately consider this issue is not binding on the CAT as the appeal before the CAT is a rehearing and the CAT is also empowered by s. 58(2)(d) of Act 712 to make 'any other decision C which the Commission could itself have made'.

[57] On the issue of 'equivalent transaction', the CAT held that 'equivalent transaction' simply means 'same type of transaction'. The findings of CAT can be seen from para. [39]:

D [39] In our view, **the purchase of the Mandatory Insurances by the employers whether directly with My EG such as RHB Insurance or with other insurance companies or agents would amount to 'equivalent transactions' ie, the same transaction**. The issue of methodology does not arise here. Hence the analogy illustrated by counsel for the Appellants does not apply to the case before us. (emphasis added)

E **[58]** It is the submission of MyEG that the CAT had committed an error in law by misinterpreting the phrase 'equivalent transaction'. MyEG has submitted that the correct approach is to apply the methodology approach, in the following manner:

F (i) The manner in which the GOM mandatory insurances are purchased differs, ie one method allows end users to purchase the GOM mandatory insurances directly *via* the online renewal system where the payment of the policies will be made simultaneously with the payment for the renewal of PLKS. For the other method, end users will have to contact their own insurance agent to purchase the GOM mandatory insurances G on their own where payment will be made to those insurance agents.

(ii) A similar analogy can be drawn to the payment of utility bills in Malaysia. Users can choose to pay the bills online, through Pos Malaysia or directly at the counters of the relevant utilities company. The processing time for the payment of bills will differ for each method H but the outcome is similar. Users are not disadvantaged in any way. They are merely exercising the options provided to them to pay their bills through the most convenient method available to them. The payment of bills through the methods as aforementioned do not constitute equivalent transactions as the methodology involved and the I investment incurred for each method is different.

[59] The methodology method advocated by MyEG in ascertaining 'equivalent transactions' was rejected by the CAT, which held that the issue of 'different methodology' does not arise in this case and therefore the analogy illustrated by counsel for MyEG do not apply in the present case.

[60] I am of the considered opinion that in construing the phrase 'equivalent transaction' within s. 10(2)(d) of Act 712, the duty is on the court to interpret the statute in order to ascertain legislative intent by reference to the words appearing in the provision itself. In the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, the Federal Court has held that:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order **to ascertain legislative intent primarily by reference to the words appearing** in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
>
> > As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs Jin *Beckwith v. R.* [1976] 12 ALR 333, at p. 337.

[61] The phrase 'equivalent transaction' is not defined in s. 2 of Act 712. Where the words/phrase of an Act of Parliament is not defined in the Act itself, it is permissible for the courts to ascertain the ordinary meaning of the words/phrase by reference to the dictionary. In *Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor* [1994] 2 CLJ 249; [1994] 1 MLJ 156, Justice Edgar Joseph JR SCJ stated that although dictionaries are not to be taken as authoritative exponents of the meaning of the words used in the Acts of Parliament, it is a well-known rule that words should be taken to be used in their ordinary sense.

[62] The Federal Court in *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 held that in "determining the proper meaning of the expression "selling" in the definition of "trafficking" in s. 2 of the Act a better approach would have been to first ascertain its ordinary meaning. As *Bindra's Interpretation of Statutes* 9th edn says at p. 394:

> It is a rule of construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. The words of a statute must *prima facie* be given their ordinary meaning.
>
> The expression "selling" is the action of the word "sell". It is defined in *Webster's New World Dictionary* 3rd edn as follows: ...

[63] The word 'equivalent' comes from the word 'equal'. In '*Oxford Advanced Learner's Dictionary of Current English*' (3rd edn) , the word 'equal' means 'the same', whether in size, amount, number etc. Therefore, I am of the considered opinion that the CAT did not commit any error in coming to the conclusion that 'equivalent transaction' simply means 'same transaction'.

[64] On the factual matrix of this case, the transactions of MyEG that form the subject matter of this case are the purchase of the mandatory insurances. I am of the considered opinion and I agree with the decision of CAT that the purchase of the mandatory insurances by the employers whether directly with MyEG such as RHB Insurance or with other insurance companies or agents would amount to the same or equivalent transactions.

[65] The next issue is to ascertain whether MyEG has 'applied different conditions' to the equivalent transactions. On this issue, the CAT has made the following findings:

> [40] Having concluded that the facts of the case constitute 'equivalent transactions', we then need to consider the other limb of section 10(2)(d) of the Act ie 'applying different conditions'. The facts of the case before us stated that there is a mandatory need for Mandatory Insurance verification imposed by JIM for the renewal of PLKS. The Mandatory Insurances purchased directly through My EG are automatically verified. However, if the purchase of the Mandatory Insurances is through other than My EG, it would appear that there is an additional step imposed by My EG in the verification exercise. The end users (other insurances and agents) are required to take additional steps to scan and upload the insurance policies to reach foreign worker according to the specification including the size of the file. The additional step constitutes a different condition to equivalent transaction ...
>
> ...
>
> [43] In our view, *the verification exercise amounts to 'applying different conditions to equivalent transactions. If the purchase of Mandatory Insurances is directly from My EG, there is automatic verification.* From the evidence, it would appear clearly that such condition imposed amounts to an abuse of the dominant position of My EG in the downstream market (section 10(2)(d)(iii) of the Act)
>
> (emphasis added)

[66] I am of the considered opinion that the above finding by the CAT is not unreasonable or irrational. If the purchase of mandatory insurances is directly from MyEG, there is automatic verification. But if the purchase of mandatory insurances is from other parties, there is a requirement of a verification exercise, and this amounts to 'applying different conditions' to equivalent transactions.

[67] However, it is the submission of MyEG that in coming to the above findings, the CAT has made an error by relying on irrelevant facts, and has failed to take into account relevant facts:

	Irrelevant Facts	Relevant Facts
a.	The verification requirement was a condition intentionally imposed by the applicants on the End Users who purchase the Government Mandated Insurance from other insurance companies, apart from RHB Insurance Berhad. (See paragraphs 48-49 of the Tribunal's Decision at page 11 of Exhibit CCM-3 of the applicant's first Affidavit).	The verification requirement is not a condition intentionally imposed by the applicants but a pre-requisite imposed by the Government in order for the applicants to issue the PLKS. Further, by virtue of being an insurance agent for RHB Insurance Berhad (which is a commercial arrangement in place since 2008), it is only natural that the policies issued by the applicants themselves are deemed verified. Please refer to Exhibit CCM-8 and Exhibit CCM-15 of the applicants first Affidavit for correspondences from the Government confirming the requirement for the applicants to verify the policies of the Government Mandated Insurances.
b.	End Users were required to upload the insurance policies according to certain specifications including file size capacity (as referred to paragraph 40 of the Tribunal's Decision). See paragraph 49 of the Tribunal's decision at page 11 of Exhibit CCM-3 of the applicant's first Affidavit.	The limitation on the file size capacity was resolved by the applicants by March 2015 (at the latest) and should no longer be referred to by the Tribunal in arriving at its decision.
c.	The Tribunal erroneously stated that there was a delay in the renewal of the PLKS, which means that End Users who purchase the Government Mandated Insurance from other insurance companies will receive their PLKS later than End Users who choose to purchase the Government Mandated Insurances directly from the second applicant. (See paragraph 40 of the Tribunal's Decision at page 8 of Exhibit CCM-3 of the applicant's first Affidavit.)	Please refer to Exhibit CCM-16 of the applicant's first Affidavit for data on the summary of PLKS permits printed by the applicants for End Users who purchase the Government Mandated Insurances from the applicants compared to those who purchase on their own. It shows that **there is no significant difference** in terms of the delivery of the PLKS to End Users, regardless of the insurance companies from whom they purchase the Government Mandated Insurances from.

[68] With regards to para. (a) of MyEG contention, I agree with counsel for MyCC that there is nothing in paras. [48] and [49] of the CAT's decision to show that the CAT actually states that the applicants had intentionally imposed the additional steps (verification requirement) on the end users. Instead, it is the position of the CAT that as a dominant concession holder in the upstream market, MyEG has a special responsibility to ensure that competition is not impaired in the downstream market.

[69] In respect to para. (b), I agree with counsel for MyCC that this paragraph is misleading because the CAT's decision addresses two timelines. The first is the past conduct of MyEG, and the second in the continuing conduct of MyEG. While it may be the case that size limitations no longer exist, this does not change the fact that it did exist in the past - and that is part of the basis of the infringement. In the event that MyEG has resolved the issues on the size limitation, the burden is on MyEG to approach MyCC with evidence proving the same. Added to these, there is the evidence of Datuk P.S Jaya, the project director of MyEG, in his statement to MyCC dated 23 March 2015 that the size restriction did exists:

> 12. It may seem that MyEG's system does not accept insurance, in this case, with reference to PIAM notes, Foreign Workers Insurance Guarantees. However, I wish to clarify that this may be due to certain teething issues in MyEG system, for example the **System could not accept insurance policies (which must be scanned and uploaded by the customers to its system for validation and verification purposes) due to limit capacity of its system** ... (emphasis added)

[70] In respect to para. (c), MyEG has admitted that there is a difference in terms of delivery of the PLKS to the end users, though MyEG claimed that it is not "significant". In any event, it is a finding of fact by the CAT which this court will not readily disturb, unless the same is without any basis.

[71] On the factual matrix of the case, the MyCC came to a finding (which was affirmed by the CAT) that MyEG had infringed s. 10(2)(d)(iii) of Act 712 during the following periods:

(i) 5 January 2015 to 22 January 2015; and

(ii) 2 May 2015 to 6 October 2015.

[72] With regards to the infringement period from 5 January 2015 to 22 January 2015, a frequently asked question ("FAQ") dated 5 January 2015 that was uploaded on MyEG's website reads:

> 14. Can I purchase my preferred insurance company for my foreign workers PLKS permit renewal Insurance Guarantee (IG).
>
> **For IG, it must be purchased through My EG.**
>
> (emphasis added)

[73] Based on the above FAQ, the CAT held that MyEG has made it mandatory for the end users to purchase the FWIG through MyEG only. Bearing in mind that since MyEG is the sole and dominant concession holder for the PLKS renewal, the CAT held that there is an obligation on MyEG to grant equal access of its facilities and prompt competition in the downstream market. This is clearly an abuse of the dominant position of MyEG, by eliminating competition altogether.

[74] MyEG did not dispute the existence of the above FAQ, but takes the position that the same was taken down. However, the CAT has made a finding of fact, and based on the confession of counsel for the applicants before it, that the infringement period is from 5 January 2015 to 22 January 2015.

[75] In respect of the period of 2 May 2015 to 6 October 2015, the CAT found that the FAQ available on MyEG website clearly stated that if the mandatory insurances were purchased from MyEG, there would be 'faster and easier renewal' (FAQ/Q5 dated 5 January 2015). Subsequently, the (FAQ/Q6 dated 8 August 2015) stated that:

> You may purchase the insurance from your preferred insurance company but we will require the scanned IG, FWCS and FWHS cover notes to be uploaded for us to verify with the respective insurance principles.

[76] From the above FAQs, the CAT found that the requirement of scanning and uploading of documents for verification for non-MyEG insurers "clearly involves two different time-sensitive processing methods, meaning different conditions were applied to equivalent transaction." The requirement of scanning and uploading for the purposes of verification would consequently cause a delay in the applications involving non-MyEG insurers, compared to the automatic verification in respect to MyEG insurers, leading to faster approval for the PLKS renewal.

[77] I am of the considered opinion that the above findings of facts cannot be said to be irrational or unreasonable.

Whether The Acts Of MyEG Have 'Harm Competition' In The Market Which They Are Participating, Whether Upstream Or Downstream

[78] On this issue, the CAT has made the following findings:

> [44] In our view, by 'applying the different conditions to equivalent transaction', resulting in the need for a longer verification time in respect of insurance purchased from other than RHB Insurance is to that extent **may harm competition in the relevant market of insurance business which My EG as the dominant enterprise is participating in the downstream market** (section 10(2)(d)(iii) of the Act) (emphasis added)

[79] MyEG takes the position that the CAT has made an error, in that the CAT has failed to take into consideration that MyCC had not established the fact that MyEG's conduct was 'harmful to the consumers'.

[80] MyEG had referred to the Hansards (during the tabling of Act 712 before Parliament), to support the contention that the underlying objective of Act 712 is ultimately to protect the consumers. Given the said objective, MyEG therefore submits that the phrase 'harm competition in any market' in para. (iii) of sub-s. 10(2)(d) must mean 'harm to the consumers'.

[81] I am of the considered opinion that where Parliament had used the phrase 'harm competition in any market', the courts must give effect to the words used by Parliament. It is not for this court to change the statutory words to 'harm to the consumers'. The Supreme Court in *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114 has held at p. 345 (CLJ); p. 130/1 (MLJ);

> ... In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and **we must guard ourselves against adding words into them which were never intended**.
>
> (emphasis added)

[82] The Federal Court in *Karunairajah Rasiah v. Punithambigai Poniah* [2004] 2 CLJ 365; [2004] 2 MLJ 401 held that it is not the function of the court to legislate the law. At p. 378 (CLJ); p. 410/H (MLJ) Justice Abdul Hamid Mohamed said:

> In this respect, the Islamic Family Law Act 1984 is more advanced than its civil counterpart. In reality, those are the words that the respondent wants the court to 'legislate as an amendment' to the existing provisions of s. 95. The respondent has succeeded in the High Court and the Court of Appeal. With respect, I will do no such thing. That is not the function of the court. This is a matter for Parliament. By doing so, the court will be usurping the function of the legislature. If separation of powers were to have any meaning, the three branches of government must respect each other's jurisdiction. There should be no interference, no usurpation of powers either way.

[83] MyEG have also relied on MyCC Guidelines on Chapter 2 Prohibition, where para 3.6 reads:

> Exclusionary conduct shall be assessed in terms of its effects on competition - which means its impact on the competitive process and not its effects on competitors. So, even if an enterprise is dominant, it should not be stopped from engaging in competitive conduct that **benefits consumers** even if inefficient competitors are harmed. (emphasis added)

[84] Added to that, MyEG has relied on several articles written by academicians, where the emphasis is to ascertain whether there is any harm to the consumers caused by the infringing conduct of MyEG.

[85] I am of the considered opinion that the said articles and para 3.6 of MyCC Guidelines on Chapter 2 Prohibition are general observation in respect of abuse of dominant position in s. 10 of Act 712. We must take note

that the nature of abuses of dominant position are found in paras (a) to (g). It is only in para (b) that there is a reference to 'to the prejudice of consumers', whereas in para (d)(iii), the reference is to 'harm competition' and not to 'harm consumers'. Therefore, if different words have been used by the Legislature, then they must mean different things. In *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1, Thomson CJ in discussing s. 47 of Courts Ordinance and the Second Schedule says:

> It is axiomatic that when different words are used in a statute they refer to different things ...

[86] Premised on the aforesaid reasons, I am of the considered opinion that the automatic verification for MyEG related insurance companies, and the requirement of additional steps for verification for non-MyEG insurance companies, is the fact that harms the competition, which according to the CAT "amounts to MyEG putting pressure on end users to purchase the mandatory insurances from My EG by virtue of its dominant position in the downstream market." The conduct of MyEG of using its dominance in the upstream market to induce the end users to use its services in the downstream market has put all the other agents and insurance companies at a competitive disadvantage. This is supported by the fact that that the commission earned by MyEG for the sale of the mandatory insurances has increased tremendously during the relevant period.

Penalties

[87] It is the submission of MyEG that the CAT had acted unreasonably when affirming the imposition of penalty during the POC stage, from 5 January 2015 to 22 January 2015, which is essentially the 'test-run' period.

[88] However, I agree with MyCC that there is nothing in law to state that the POC stage is a defence to abusive conduct. Added to that, the FAQ was uploaded without any consultation with JIM and that it was not mandatory for end users to purchase mandatory insurances from the applicants as set out in the letter from BNM to PIAM dated 16 February 2015 and the letter from KDN to PIAM dated 27 March 2015.

[89] MyEG also submit that the CAT had erroneously affirmed MyCC's final decision in computing the financial penalty from 2 May 2015 to 6 October 2015 by relying on an old FAQ of MyEG. However, I agree with MyCC that as at 31 July 2015, the second version of the FAQ had stated that end users should purchase the mandatory insurances for "faster and easier" renewals. This FAQ represented an inducement to encourage end users to use MyEG related insurance companies.

[90] MyEG further submits that the CAT had erroneously affirmed MyCC's decision to impose the daily penalty of RM7,500 on MyEG from 6 October 2015 to 24 June 2015 on the grounds that MyEG had not provided an efficient gateway. MyEG had given three options to the end users.

[91] With regards to the three options, option 1 is MyEG offer of a choice of nine insurance companies where the mandatory insurances can be bought. These insurance companies are MyEG's insurance agents. Option 2 involves buying from other insurance companies and it involves going to non-MyEG insurance websites. With the purchase, the buyer then goes back to MyEG portal to key in the policy number for verification. Option 3 involves insurance companies who do not wish to participate in MyEG direct online verification system, and these buyers will have to manually upload the policies onto MyEG website.

[92] In its finding of facts on this issue, the CAT had affirmed the findings of MyCC and held that:

> [54] From these 3 options, it is clear that Option 2 and Option 3 involve additional steps to process the mandatory insurance than Option 1; which means that MyEG has imposed different trading conditions to equivalent transactions.

[93] On the issue of proportionality of the penalties imposed, I am of the considered opinion that both MyCC and the CAT are empowered by Act 712 to impose the penalties, and that these penalties are imposed in accordance with MyCC's Guidelines on Financial Penalties.

Conclusion

[94] The first applicant holds the monopoly in the provision of the PLKS renewal services. The first applicant had established the second applicant to act as an agent for RHB Insurances (and other insurance companies) to provide for the purchase of the mandatory insurances. The dominance of MyEG in the upstream market has a special responsibility to ensure that its conduct did not have exclusionary effect in the downstream market. MyCC's Guidelines state that exclusionary conduct is a form of conduct that prevents equally efficient competitors from competing.

[95] In the present case, the conduct of MyEG of using its dominance in the upstream market to induce end users to use its services in the downstream market has put other agents and insurance companies at a competitive disadvantage. MyEG, in its position as the dominant concession holder in the upstream market has failed to ensure that there is a platform equally available to all, so that there is no abuse in the downstream market.

[96] Premised on the reasons enumerated above, I am of the considered opinion that there is no merit in this application and the same is dismissed with cost.